IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 81

ROBERT L. SCHLAGENHAUF, *Petitioner*

v.

CALE J. HOLDER, United States District Judge for the Southern District of Indiana, *Respondent*

On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE PETITIONER

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Ave.
Washington, D. C.

DAVID A. STECKBECK
13 North Pennsylvania Street
Indianapolis, Indiana

CHARLES T. BATE
13 North Pennsylvania Street
Indianapolis, Indiana

Counsel for Petitioner

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CITATIONS

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OPINIONS BELOW

The District Court for the Southern District of Indiana rendered no opinion. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 321 F. 2d 43.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 23, 1963 (R. p. 84). The petition for a writ of certiorari was filed on October 18, 1963, and granted on January 13, 1964, 84 U.S. 516. The jurisdiction of this Court rests upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULES INVOLVED

4th Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

28 U.S.C. § 1651 (a):

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. § 2072:

"The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May; and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court."

Rule 35 (a) Federal Rules of Civil Procedure:

"(a) Order for Examination. In an action in which the mental or physical condition of a party

is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

Rule 37b(2), Federal Rules of Civil Procedure:

"*Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) an order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the

order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination."

QUESTIONS PRESENTED

In a diversity suit for damages as filed by injured bus passengers in the United States District Court for the Southern District of Indiana against this petitioner and other defendants, one of the defendants filed a cross-claim for property damage against this petitioner. The cross-claimant and two other defendants to the original action then sought under Rule 35 of the Federal Rules of Civil Procedure to require this petitioner, who was the driver of the bus in which the passenger plaintiffs were injured, to submit to a physical examination by a competent qualified specialist in each of the following fields: (1) internal medicine; (2) ophthalmology; (3) neurology; and (4) psychiatry (R. 7). In the request for examinations two doctors were listed as competent qualified individuals in the respective fields of internal medicine, ophthalmology, neurology and psychiatry from which four could be selected should the petition for physical examination be granted. In complete disregard of the request in the petition for the physical examination, the respondent entered an order requiring the petitioner to submit to physical and mental examinations by all nine of the specialists suggested in the petition (R. 5, 6). On March 13, 1963 a petition was filed in the United States Court of Appeals for the

Seventh Circuit for a writ of mandamus under 28 U.S.C. § 1651 (a) directed to the respondent commanding him to vacate the orders for the same examinations. The Court of Appeals by a two to one decision denied the petition. The questions presented are:

1. Whether extraordinary writ of mandamus is proper remedy to review order of respondent ordering mental and physical examinations of the defendant petitioner under Rule 35 of the Federal Rules of Civil Procedure.

2. Whether the respondent had the power to order mental and physical examinations of the defendant petitioner, under Rule 35, Federal Rules of Civil Procedure, who is not himself claiming damages for personal injury.

3. Whether the petitioner was a party whose mental and physical condition was in controversy within the meaning of Rule 35, Federal Rules of Civil Procedure.

4. Whether the respondent abused his discretion under the provisions of Rule 35 in ordering physical and mental examinations of the defendant petitioner.

5. Whether the respondent abused his discretion in ordering nine separate physical and mental examinations of a defendant.

6. Whether the order of the respondent violated the petitioner's substantive right of privacy and his constitutional rights under the 4th, 5th and 14th Amendments of the Constitution of the United States.

STATEMENT

A diversity action involving in excess of the required jurisdictional amount was brought in the United States District Court for the Southern District of Indiana by three plaintiffs seeking damages resulting from personal injuries sustained as the result of a collision be-

tween a bus and a tractor-trailer occurring in the State of Indiana on July 13, 1962. The named defendants were The Greyhound Corporation, owner of the bus; Robert L. Schlagenhauf, the bus driver; Contract Carriers, Inc., owner of the tractor; Joseph L. McCorkhill, driver of the tractor; and National Lead Company, owner of the trailer. After the original complaint had been amended (R. pp. 15-24), answers were filed on behalf of all defendants. The Greyhound Corporation filed its amended cross-claim for bus damage against Contract Carriers, Inc. and National Lead Company (R. pp. 24-34). The defendant National Lead Company filed its cross-claim for trailer damage against The Greyhound Corporation and Robert L. Schlagenhauf (R. pp. 49-53). Contract Carriers, Inc. filed a letter, pursuant to the respondent's order, setting forth the specific allegations relied upon in defense of Greyhound's cross-claim including the following:

> "4. The defendant, The Greyhound Corporation, carelessly and negligently employed and caused its driver, Robert L. Schlagenhauf, to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred, which fact was known or should have been known to The Greyhound Corporation." (R. pp. 40).

Robert L. Schlagenhauf, petitioner herein, is not a party to the cross-claim in connection with which these allegations of Contract Carriers, Inc. were made. The only allegation concerning petitioner's physical or mental condition in the cross-claim of National Lead Company, to which the petitioner was named a party defendant, is "that the defendant, The Greyhound Corporation acting by and through its said agent . . .

and its said employee . . . were guilty of carelessness and negligence in one or more of the following particulars:

> . . . . (8) by permitting said bus to be operated over and upon said public highway by said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was (sic) impaired and deficient." (R. p. 52).

No similar allegations were made by the plaintiffs in their amended complaint.

On February 5, 1963, Contract Carriers, Inc., Joseph McCorkhill, and National Lead Company filed a joint petition for an order requiring Robert L. Schlagenhauf to submit to physical and mental examinations (R. pp. 7-10) "by a competent, qualified specialist" in each of the fields of internal medicine, opthalmology, neurology, and psychiatry on the stated ground that "the physical and mental condition of the defendant Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second paragraph of affirmative answer on the part of the defendants, Contract Carriers, Inc., and Joseph L. McCorkhill, to the defendant Greyhound's cross-claim" (R. p. 8). The said petition further nominated two named physicians in the field of internal medicine, two in the field of ophthalmology, three in the field of neurology, and two in the field of psychiatry and asked that one physician in each such category be appointed for a total of four examinations. The only effort on the part of the moving parties to

show good cause for any of the examinations was the assertion, supported by affidavit (R. p. 9), of the following grounds:

> "(1) The defendant, Robert L. Schlagenhauf, was involved in a similar type accident near the town of Flatrock, Michigan, while driving a motor bus for the defendant, Greyhound Corporation.
>
> (2) The lights of the tractor-trailer unit which was struck by the bus driven by the defendant Schlagenhauf, were visible from three-fourths to one-half mile to the rear of said vehicle.
>
> (3) The defendant Schlagenhauf saw red lights ahead of him for a period of ten to fifteen seconds prior to impact and yet did not reduce speed or alter his course."

Neither the petition nor the affidavit showed the date of the earlier accident, nor how the bus driver was "involved"; that the lights of the tractor-trailer either were visible or should have been visible to the bus driver at the distance of one-half to three-quarters mile during which distance they were visible to another driver in another vehicle travelling ahead of the bus; that the red lights admittedly seen by the bus driver for ten to fifteen seconds prior to impact were on the tractor-trailer with which the bus collided; that there is no adequate alternate method of making proof of petitioner's physical and mental condition, nor that the examinations sought would establish the condition of the bus driver as it existed on July 13, 1962. No hearing was held. The respondent, however, on February 21, 1963, granted the petition and ordered this petitioner to submit to physical and mental examinations by two named internists, two named ophthalmo-

logists, three named neurologists and two named psychiatrists (R. pp. 5, 6). On March 13, 1963 the petitioner filed in the Court of Appeals his petition for writ of mandamus directed to the respondent commanding him to vacate the order of February 21, 1963 (R. pp. 1-4). On March 14, 1963 the defendants Contract Carriers, Inc. and Joseph L. McCorkhill by one petition (R. pp. 55-61) and the defendant National Lead Company in a separate petition (R. pp. 64-68) again asked for the same physical and mental examinations of Robert L. Schlagenhauf, and the new petitions were termed "supplementary" to the original petition allegedly because the physical and mental condition of Robert L. Schlagenhauf had become additionally in issue by virtue of the National Lead Company cross-claim which was filed on February 15, 1963 (R. p. 49), subsequent to the filing of the original joint petition. There was no additional effort to show good cause for the granting of the requested order and no affidavit was filed in support of the March 14th new National Lead Company petition. On March 15, 1963 the respondent entered orders sustaining the amended or supplemental petitions and requiring that Robert L. Schlagenhauf submit to physical and mental examinations by the same nine physicians named in the original order of February 21, 1963 (R. pp. 62-63 and 68-70). The orders of March 15, 1963 were substantially identical to the original order except that the order issued upon the new petition of the defendants Contract Carriers, Inc. and Joseph L. McCorkhill required compliance by May 1, 1963 while the order issued upon the new petition of the defendant National Lead Company required compliance by April 1, 1963. The Court of Appeals stayed the orders pending disposition of the petition for writ of mandamus. The

Court of Appeals entered a rule against the respondent to show cause why a writ of mandamus should not be issued (R. pp. 41-42), and the respondent filed his answer on April 27, 1963 (R. p. 42). On July 23, 1963 the Court of Appeals rendered an opinion (R. pp. 70-83) and entered judgment (R. p. 84) denying the petition for writ of mandamus by a two to one decision, Circuit Judge Swygert and District Judge Grant constituting the majority and Circuit Judge Kiley dissenting with opinion. The Court concluded that Rule 35 applies to a party defendant as well as to a party plaintiff; that this petitioner is a party as to National Lead Company only and is still not a party as to Contract Carriers, Inc. and Joseph L. McCorkhill; that the respondent had the power under Rule 35 as declared procedural and therefore valid in *Sibbach* v. *Wilson & Company*, 312 U.S. 1 (1941) to order physical and mental examinations of a party defendant if such party's physical and mental condition is in controversy and if good cause is shown. In addition, although it is difficult to determine whether the mental and physical condition of a party defendant who himself is making no claim for damages for personal injuries is in controversy, such condition of the petitioner Robert L. Schlagenhauf may be said to be in controversy in the action for damages asserted by National Lead Company in its cross-claim. Finally and in summary the Court of Appeals concluded that the respondent acted within his power in ordering an examination under Rule 35, and the alleged abuse of discretion in exercising the power must await review on appeal from a final judgment. Judge Kiley in his dissenting opinion agreed that the petitioner is a "party" subject to Rule 35 as to National Lead Company but expressed doubt as to whether petitioner's physical and mental

condition is "in controversy" within the meaning of the rule. He concluded that in any event good cause as required by Rule 35 was not sufficiently shown to justify the ordering of the nine examinations, particularly the mental tests, and therefore the respondent committed gross error amounting to an abuse of discretion which justified the issuance of a writ of mandamus. On October 18, 1963 the petitioner filed a petition for certiorari with this Court which was granted on January 13, 1964 (R. p. 85).

SUMMARY OF ARGUMENT

The decision of the Circuit Court of Appeals denying the defendant petitioner's petition for a writ of mandamus, by which writ the petitioner sought to have vacated an order of the respondent, issued under Rule 35 of the Federal Rules of Civil Procedure, commanding the defendant petitioner to submit to physical and mental examinations by nine court appointed physicians, should be reversed.

I

The petitioner sought the writ of mandamus under the authority of 28 U.S.C. § 1651(a) of the All Writs Statute and the Circuit Court of Appeals had the power to issue such writ in aid of jurisdiction (*Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 1953). The petitioner contends that the writ of mandamus is a proper remedy where (a) the equities of the case are extraordinary (*Ward Baking* v. *Holtzoff*, 164 F. 2d 34, (2nd Cir. 1947); see also majority opinion R. p. 75); (b) action of district court is improper or beyond authority (*Labuy* v. *Howes Leather*, 352 U.S. 249 (1957)); (c) action of district court is erroneous (*Chicago, Rock Island and Pacific Railroad Co.* v. *Igoe*,

220 F. 2d 299, (7th Cir. 1955); *Atlass* v. *Miner*, 265 F. 2d 312, (7th Cir. 1959); (d) district court abused discretion (*Labuy* v. *Howes Leather, supra*); (e) to await appeal on the merits would be clearly ineffective (*Atlas* v. *Miner;* see also majority opinion R. p. 75).

The petitioner submits, as will hereinafter be shown, that the respondent did not have authority to issue the order complained of or if the court possessed such power, its issuance, under the circumstances, constitutes a clear abuse of discretion on the part of the respondent and further that the order complained of is interlocutory and not directly appealable (*Bowles* v. *Commercial Casualty Insurance Co.*, 107 F. 2d 169, (4th Cir. 1939)). Therefore the petitioner has no adequate remedy other than his prayer that a prerogative writ of mandamus issue.

II

There are no prior decisions in point wherein, under Rule 35 of the Federal Rules of Civil Procedure, a defendant in a tort action has been ordered to submit to a physical and/or mental examination. The defendant petitioner contends that the respondent did not have power to issue the order in question. There is no inherent power in federal courts to order such examinations (*Union Pacific Ry.* v. *Botsford*, 141 U.S. 250, (1891)). The court in *Sibbach* v. *Wilson & Co.*, 312 U.S. 1 (1941), upheld the power of the court under Rule 35 to order the physical examination of a plaintiff who voluntarily resorts to the federal courts to recover for personal injuries and thereby "waives" a portion of his right to claim the inviolability of his person. The defendant petitioner, unlike the subject in *Sibbach* v. *Wilson & Co. supra*, did not resort to the

federal court. He has made no claim for personal injuries and consequently has not in any manner waived his right to the inviolability of his person as controlled and protected by the underlying considerations of personal liberties as expressed by the court in *Union Pacific R. Co.* v. *Botsford, supra.*

Therefore, the respondent issued said orders complained of without power, said order not being issued by authority of law and there being no inherent power in the district court to issue said order.

III

Rule 35 of the Federal Rules of Civil Procedure expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown. Assuming that the respondent had the power under Rule 35 to order the physical and mental examinations of the petitioner (which the petitioner denies) the respondent abused his discretion in so ordering.

A. Rule 35 expressly applies only to a party and may not be extended to persons who are not parties. (*Dulles* v. *Quan Yoke Fong,* 237 F. 2d 496 (1956); *Fong Sik Leung* v. *Dulles,* 226 F. 2d 74, (1955)).

As was stated by the Circuit Court of Appeals (see majority opinion R. p. 77): "The original suit by Markiewicz, et al, although listing Schlagenhauf as a party defendant, is separate and distinct from the cross-claims filed by the various defendants in the Markiewicz suit." "Moreover, Schlagenhauf did not assume the status of a party defendant vis-a-vis Contract Carriers and McCorkhill merely by their listing his name in affirmative defenses to the cross-claim against them by Greyhound."

At the time the original petition was filed on February 5, 1963, by Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company the petitioner was not a "party" within the meaning of Rule 35 and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCorkhill (see majority opinion R. p. 77). Therefore, the order of February 15, 1963 (R. p. 49-54), granted upon the petition of February 5, 1963 (R. p. 7-14) and the order of March 15, 1963 (R. p. 62-63), granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill, were issued by the respondent without authority notwithstanding the "validity" of the additional order of March 15, 1963 (R. p. 68-70) as granted upon the unverified second petition of National Lead Company which party had by that date made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

B. Another prerequisite of Rule 35 is that the physical or mental condition if the person to be examined be "in controversy". The petitioner contends "in controversy" means immediately and directly not merely in controversy, incidentally or collaterally. *Wadlow* v. *Humberd*, (1939), 27 F. Supp. 210). The plaintiffs Markiewicz have expressly placed "in controversy" their physical and mental condition by their amended complaint seeking damages for injuries allegedly permanent. The petitioner has made no claim for personal injuries. The petitioner's physical and mental condition is relevant only with reference to the moment of impact. The only pleading allegation concerning the petitioner's physical or mental condition, aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property dam-

age cross-claim of The Greyhound Corporation, to which this petitioner is not a party, is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defected (R. p. 52). The physical and mental condition of the petitioner is therefore not immediately and directly in controversy under the pleadings. Only the condition of the petitioner's vision is even incidentally or collaterally in controversy. "Mere lip service to the requirements of 'in controversy' and 'good cause' in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy." (Majority Opinion R. p. 80).

C. The invasion of the petitioner's privacy by a physical or mental examination is so serious that a strict standard of the "good cause" requirement of Rule 35, supervised by the district courts, is manifestly appropriate. (*Guilford National Bank of Greensboro v. Southern Ry. Co.*, 297 F. 2d 921, (4th Cir. 1962)). Respondent's orders of February 15, 1963 and March 15, 1963 (with respect to the petition of Contract Carriers and Joseph L. McCorkhill) were based solely upon the petitions themselves and affidavits of counsel attached thereto. No hearings were had nor inquiry made beyond the petitions. As previously argued at the time of the original order and the order of March 15, 1963 with respect to Contract Carriers, Inc. and Joseph L. McCorkhill, the petitioner was not a party. The order of the respondent of March 15, 1963 upon the petition of National Lead Company was issued solely upon the allegations contained in the petition; no affidavit was attached, no hearing was held and no inquiry was made beyond the petition. The petitioner submits an invasion of an individual's privacy by a

physical and mental examination is so serious that such right should not be transgressed until the trial court has established a reasonable basis upon which to exercise discretion under a strict standard of good cause. In the words of Circuit Judge Kiley (dissenting opinion R. p. 83): "That was not done here."

D. Rule 35(a) provides that "the order may be made only on motion for good cause shown . . .". Apart from Rule 35, the respondent could only have entered an order for physical or mental examinations if a statute of the State of Indiana authorized such an order (*Camden & Suburban Ry. Co.* v. *Stetson*, 177 U.S. 172, 1900). There is no such Indiana statute. The respondent's orders therefore ordering nine examinations was wholly unauthorized and constituted a usurption of judicial power. The respondent therein committed gross error amounting to an abuse of discretion.

IV

In the foregoing paragraphs of the summary the petitioner has set forth grounds upon which he contends that the orders entered against him by the respondent were not within the power of the respondent to issue or were issued not in conformity with Rule 35. There being no inherent power in a federal court to order such examinations of a person (*Union Pacific Ry.* v. *Botsford*, 141 U.S. 250 (1891)), and such orders not being authorized by clear and unquestionable authority of law, said orders constitute an invasion of the petitioner's person and a deprivation of his liberty and thereby violate his right of privacy as expressed in *Union Pacific Ry.* v. *Botsford* and the guarantees of the 4th, 5th and 14th Amendments to the Constitution of the United States.

V

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

ARGUMENT

I

PROPRIETY OF WRIT OF MANDAMUS TO REVIEW ORDER OF RESPONDENT

The petitioner seeks to have reversed the judgment of the Court of Appeals for the Seventh Circuit denying the petitioner's Petition for Writ of Mandamus by which writ the petitioner sought to have vacated an order by the respondent commanding the petitioner to submit to physical and mental examinations by nine court appointed physicians.

The issuance of the writ prayed for is authorized by the All Writs Statute of the Judicial Code of 1948, 28 U.S.C. § 1651(a) as follows:

> "Sec. 1651. Writs.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the wages and principles of law."

The case below is one over which the Court of Appeals for the Seventh Circuit has appellate jurisdiction, and thus the Court of Appeals had the power, if it had chosen, to issue a writ of mandamus in aid of jurisdiction. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382, 383; 98 L. ed. 106, 111, 112; 74 S. Ct. 145 (1953).

It is recognized by the petitioner that, notwithstanding the power to issue the writ, the Court must exercise its discretion either to grant or deny the petition and that a writ of mandamus is not to be used in routine matters, but is reserved for cases approaching the extraordinary (*Ward Baking* v. *Holtzoff*, 164 F. 2d 34, (2d Cir. 1947)); not to be used as a substitute for appeal. (Ex Parte Fahey, 332 U.S. 258, 1947); nor to permit the Circuit Court of Appeals to exercise the discretion entrusted by law to the district court (*Fisher* v. *Delehart*, 250 F. 2d (8th Cir. 1947)).

It is respectfully submitted, as will be hereinafter more particularly shown, that the order complained of is extraordinary, that the district court did not have power to issue said order, or if the court possessed said power, its issuance constitutes a clear abuse of discretion on the part of the respondent. That the finding of lack of authority or abuse of discretion justifies the issuance of a writ of mandamus is recognized in the following reported opinions:

> A. C.Nielsen Co. v. Hoffman, 270 F. 2d 693 (7th Cir. 1959). "We think the question we must determine is whether there was an abuse of discretion."
>
> Chicago, Rock Island and Pacific Railroad Co. v. Igoe, 220 F. 2d 299, 304 (7th Cir. 1955). Must be "so clearly erroneous as to amount to an abuse of his discretion." Cited by Circuit Judge Kiley in dissenting opinion (R. p. 83).
>
> Goldberg v. Huffman, 226 F. 2d 681 (7th Cir. 1955) "Such a writ, says the Supreme Court in State of Virginia v. Rives, 100 U.S. 313, 323, 25 L. ed. 667, 'does not lie to control judicial discretion, except when that discretion has been abused' . . . we can only act when and if it is shown that he has abused it."

The Court of Appeals in the instant case applied the principles relating to the issuance of a writ of mandamus as stated in *Labuy* v. *Howes Leather*, 352 U.S. 249 (1957):

> "As this court pointed out in Los Angeles Brush Mfg. Co. v. James, 272 U.S. 701, 706, 71 L. ed. 481, 483, 47 S. Ct. 286 (1927): '(W)here the subject concerns the enforcement of the . . . (r) rules which by law it is the duty of this court to formulate and put in force,' mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked. As was said there at page 707, were the court '. . . to find that the rules have been practically nullified by a district judge . . . it would not hesitate to restrain (him) . . .'."

and properly asserted at the outset that the writ of mandamus should be denied "Unless we are prepared to say that the district court was without power to enter the Rule 35 discovery order or that the district court so clearly abused his discretion as to make the equities of this case truly extraordinary, precluding adequate relief by way of appeal." (R. p. 75).

There is also precedent for the use of a writ of mandamus to correct an erroneous discovery order in *Atlas* v. *Miner*, 265 F. 2d 312 (7th Cir. 1959), wherein the Circuit Court of Appeals granted the writ to prevent enforcement of an order directing petitioner to submit to an oral discovery deposition since "critical issue raised at this juncture strikes at a fundamental procedure question, to await its determination until the hearing of an appeal on the merits of the case would afford a clearly inadequate remedy". In praising this decision, it has been stated at 4 Moore's Federal Practice 1748 that:

> "... Atlas authorized mandamus by emphasizing: (a) that a fundamental procedural question was involved; and (b) desire to avoid a conflict of opinion among the district judges of the circuit. It would seem that the Atlas rationale, as expressed by the circuit court may provide incentive for other appellate courts to exercise effective appellate supervision over the discovery process."

Since the order for the physical and mental examinations of the petitioner is interlocutory and not directly appealable (*Bowles v. Commercial Casualty Insurance Co.*, 107 F. 2d 169 (4th Cir. 1939)), petitioner has no adequate remedy other than his prayer that a prerogative writ of mandamus issue. No effective appellate review of discovery orders can be had, except possibly in connection with a contempt order, unless the party against whom an order for discovery has been entered wishes to take the extreme step of permitting the action to be dismissed or default entered for failure to comply with the order. While this procedure permits immediate appellate review, it obviously involves great risk; and even here the right to appeal is in effect dependent upon the consent of the district court, which can, instead of ordering dismissal or default, enter some non-appealable order, such as a stay or an order precluding introduction of certain evidence or support or defense of certain claims. See 4 Moore's Federal Practice 1775.

With default or other penalty on one side and unwarranted submission to the invasion of his person on the other, it is respectfully submitted that the issuance of a writ of mandamus is the petitioner's only effective and adequate remedy, under the extraordinary circumstances here existing.

RESPONDENT DID NOT HAVE POWER TO ORDER MENTAL AND PHYSICAL EXAMINATIONS OF THE DEFENDANT PETITIONER

The Court of Appeals has itself recognized the importance of the questions involved and has affirmed the fact that there has heretofore been no prior decision in point as stated in the opening paragraph of the majority opinion:

> "Robert L. Schlagenhauf petitions for a writ of mandamus (28 U.S.C. § 1651(a), the All Writs Act) directed to the Honorable Cale J. Holder, District Judge. The petition raises an important question respecting the scope of Rule 35, Fed. R. Civ. P., viz, whether a federal district court has the power to order a mental and physical examination of a person who is a defendant in a tort action. We know of no prior decision directly in point." (R. p. 71).

The leading case upholding the power to compel a party to submit to physical or mental examination arose in the Seventh Circuit in *Sibbach* v. *Wilson & Co.* (1941), 312 U.S. 1, 61 S. Ct. 422, 85 L. ed. 479. The Supreme Court was concerned with the fact that prior to the Federal Rules of Civil Procedure there was no inherent power in a United States District Court to order an examination as had been pronounced in *Union Pacific R. Co.* v. *Botsford*, (1891) 141 U.S. 250, 11 S. Ct. 1000, 35 L. ed. 734, in which it was said:

> "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law. As well said by Judge Cooley, 'The right to one's person may be said to be a right of complete immunity: to be let alone'."

The Court of Appeals concluded that the respondent did have the power to order the physical and mental examination of the petitioner upon the authority of this Court's decision in the *Sibbach* v. *Wilson & Co.* case. However, it is submitted that the Sibbach decision only stands for the proposition that Rule 35 is procedural and invades no substantive right within the terms of the Enabling Act (former 28 U. S. C. § 723 b-c, now 28 U. S. C. § 2072) when applied to plaintiffs or other parties who voluntarily resort to the federal courts and thereby "waive" a portion of their rights to claim the inviolability of their persons. The Sibbach decision does not determine the validity of an attempt to use Rule 35 to force a defendant who becomes a party in a federal court against his will and who does not himself make a claim for damages for personal injuries to suffer invasion of his person in the form of physical and/or mental examinations. Neither the Court of Appeals in its opinion nor this Court has answered the rhetorical question posed at 3 Ohlingers Federal Practice (Rev. Ed.) 610 as quoted in the subject opinion (R. p. 78, 79):

> "Finally, in Sibbach v. Wilson & Co. (1941) 312 U. S. 1, 61 S. Ct. 422, 85 L. Ed. 479, by five to four decision rendered on January 13, 1941, the Supreme Court declared that the rule is procedural in character and that it invades no 'substantive' right within the terms of the Enabling Act, as distinguished from a right which is merely 'substantial' or 'important'. To the suggestion that the rule offends the important right to freedom from invasion of the person the court replies that it '. . . ignores the fact that a litigant need not resort to the federal courts unless willing to comply with the rule . . .'."

> "This does not, however, answer the point; what of the litigant who does not resort to a federal court, has no intention of resorting to it, and does not wish to restort to it—a litigant, for instance, whose case is removed from a state court to a federal court, or who is made a defendant in a federal court against his will—is he exempted by the operation of the rule? The fact remains that Congress has conferred on the federal courts no power to make an order requiring a party to submit to a physical examination."

The Court of Appeals in the majority opinion acknowledged that a number of states have provided for procedural devises, by statute, rules of court or by decision, for the discovery of the mental and physical condition of a party similar to Rule 35. However, as pointed out by the Court of Appeals: "This type of discovery has most frequently been applied in situations in which the moving party is a defendant asking for the mental or physical examination of a plaintiff so as to ascertain the extent of the latter's injuries". "This was the situation in Sibbach. Indeed, the cases seem to proceed on the theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" a portion of his right to claim the inviolability of his person. In the interests of justice, the plaintiff, by seeking relief, must submit to a physical examination to aid in the ascertainment of the truth of his claims—he may not conceal, or make difficult of proof, that which is the very basis of his action and which is particularly within his knowledge." (R. p. 77).

The petitioner submits the problem is controlled by the policy underlying the *Union Pacific R. Co.* v. *Botsford* (1891) 141 U. S. 250 decision. It rested upon

consideration of the liberties of the subject in denying inherent power:

> "The inviolability of the person is as much involved by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission, was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country." (at 252).

As was pointed out by Mr. Justice Frankfurter, dissenting in *Sibbach* v. *Wilson & Co.*: "To be sure the immunity that was recognized in the Botsford case has no constitutional sanction." "It is amenable to statutory change. But the inviolability of a person was deemed to have such historic roots in Anglo-American law that it was not to be curtailed unless by clear and unquestionable authority of law."

Your petitioner respectfully submits that the Court should be very slow to sanction any violation of or an interference with the person of a free citizen. Although the court in *Sibbach* v. *Wilson* has held that Rule 35 now constitutes sufficient "authority of law" to justify an invasion of the person of a party whose physical or mental condition is voluntarily in controversy, the petitioner would show that unlike the subject in the *Sibbach* case the petitioner did not resort to the federal court, has no intention of resorting to it, nor has he made claim for personal injuries thereby voluntarily

placing his physical and mental condition in controversy.

If Rule 35 does not constitute lawful authority to require physical and mental examinations of a defendant, as is respectfully contended by this petitioner, no such authority therefor exists, and this Court has refused to recognize any inherent power in federal courts to order such examinations of the person. (*Union Pacific Ry.* v. *Botsford*, 141 U. S. 250 (1891).)

III

IF RESPONDENT HAD POWER TO ORDER PHYSICAL AND MENTAL EXAMINATIONS OF DEFENDANT PETITIONER RESPONDENT ABUSED DISCRETION IN SO ORDERING

Even if Rule 35 should be held to constitute lawful authority for the kind of examinations complained of, the power to order them exists only upon compliance with the conditions of the rule as properly stated by the Court of Appeals (R. p. 81). Such Rule expressly applies only to a "party" whose physical or mental condition is "in controversy" and then only if "good cause" is shown.

A. Respondent's Order Requires Physical and Mental Examinations of Petitioner Who Is Not a Party to the Claim in Which Such Examination Is Sought.

The following pertinent events occurred in the court below and are hereinafter set out chronologically, not to be repetitive or burdensome, but because such chronology is important to the clarity of petitioner's argument.

(1) Amended cross-claim of The Greyhound Corporation (petitioner not a plaintiff) filed against Contract Carriers, Inc. and National Lead Company (R. p. 24-34).

(2) November 13, 1962, answer of Contract Carriers, Inc. and Joseph L. McCorkhill to cross-complaint of The Greyhound Corporation filed (R. p. 34-37).

(3) January 21, 1963, letter of Contract Carriers, Inc. to district judge pursuant to pre-trial order adding additional charges in support of its Second Defense to the cross-complaint of The Greyhound Corporation (R. p. 38-40)

(4) February 5, 1963, petition for physical and mental examinations of petitioner filed by Contract Carriers, Inc., Joseph L. McCorkhill and National Lead Company (R. p. 7-14).

(5) February 15, 1963, National Lead Company files answer to amended cross-claim of The Greyhound Corporation and cross-claim against The Greyhound Corporation and Robert L. Schlagenhauf (R. p. 49-54).

(6) February 21, 1963, order of district judge granting February 5th petition for physical and mental examinations of petitioner and ordering said examinations to be conducted by nine physicians (R. p. 5-6).

(7) March 13, 1963, Robert Schlagenhauf files petition for Writ of Mandamus with Court of Appeals of Seventh Circuit (R. p. 1-4).

(8) March 14, 1963, petition for physical and mental examinations of petitioner filed by Contract Carriers, Inc. and Joseph L. McCorkhill (R. p. 55-61).

(9) March 14, 1963, petition for physical and mental examinations of petitioner filed by National

Lead Company (R. p. 64-67). (Unsupported by affidavit).

(10) March 15, 1963, district judge grants petition of Contract Carriers, Inc. and Joseph L. McCorkhill and orders the petitioner to submit to examination by nine physicians (R. p. 62-63).

(11) March 15, 1963, district judge grants petition of National Lead Company and orders the petitioner to submit to examination by nine physicians (R. p. 68-70).

The cross-defendants in their motion of February 5, 1963 for the physical and mental examinations state that:

> "The physical and mental condition of the defendant, Robert L. Schlagenhauf, is in controversy and is at issue in this action now pending, being specifically raised by the charge of negligence applicable thereto in the second pararaph of affirmative answer on the part of the defendants, Contract Carriers and Joseph L. McCorkhill, *to the defendant Greyhound's cross-claim.*" (emphasis supplied).

Thus, the cross-defendants expressly sought the order complained of in connection with the cross-action inasmuch as two of them charged in answer thereto that the cross-claiming Greyhound Corporation was negligent in employing and causing its driver, the petitioner, "to operate said bus upon a public highway, although said Robert L. Schlagenhauf was not mentally or physically capable of operating said bus upon a public highway at the time and place when said accident occurred which fact was known or should have been known to The Greyhound Corporation." (R. p. 40).

No such charge is made by the plaintiffs Markiewicz in their amended complaint and only in connection with the cross-claim is the physical or mental condition of Robert L. Schagenhauf referred to in the pleadings. As may be noted from the amended cross-claim of The Greyhound Corporation (R. p. 24-34), the sole cross-claimant is The Greyhound Corporation, and the petitioner, Robert L. Schlagenhauf, is not a party to said cross-claim either as a plaintiff or defendant. Rule 35 of the Federal Rules of Civil Procedure, under the provisions of which the order complained of was purportedly issued, expressly applies only to a *party* and may not be extended to include persons who are not parties.

Dulles v. *Quan Yoke Fong* (9th Cir. 1956) 237 F. 2d 496.

Fong Sik Leung v. *Dulles* (9th Cir. 1955) 226 F. 2d 74.

Kropp v. *General Dynamics Corp.* (1962) 202 F. Supp. 207.

After the petition for the examinations was filed on February 5, 1963, it is the fact that the defendant National Lead Company did file a cross-claim naming both The Greyhound Corporation and the petitioner, Robert L. Schlagenhauf, as cross-defendants, but the said National Lead cross-claim (R. p. 52) as to any physical or mental defect of Robert L. Schlagenhauf recited only that Robert L. Schlagenhauf was "tired and sleepy" at the time of the collision and had "impaired and deficient" vision. No mental condition was alleged and no physical defect other than as to vision was alleged. In any event, the National Lead Company cross-claim was not before the court below at the time

the petition for physical and mental examinations was filed and therefore could not have constituted a ground in support thereof.

The petitioner submits he was not a "party" within the meaning of Rule 35 as to either Contract Carriers, Inc., Joseph L. McCorkhill or National Lead Company at the time the original petition for Rule 35 discovery was filed, and he is not yet a party as to either Contract Carriers, Inc. or Joseph L. McCorkhill (see majority opinion below, R. p. 77). The order of February 15, 1963, therefore, as granted upon the petition of Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company and the order of March 15, 1963, granted upon the supplementary petition of Contract Carriers, Inc. and Joseph L. McCorkhill were beyond the power of the respondent notwithstanding the validity or non-validity of the additional order of March 15, 1963 as granted upon the unverified second petition of National Lead Company which party by that date had made the petitioner a party defendant to the National Lead Company cross-claim for property damage.

B. Respondent's Order Requires Physical and Mental Examinations of Petitioner Although Petitioner's Physical and Mental Condition Is Not in Controversy in This Action.

Whatever the petitioner's status as a party may be, another prerequisite of Rule 35 before a physical or mental examination may be ordered is that the physical or mental condition of the person to be examined be "in controversy". The plaintiff's amended complaint expressly places the physical conditions of the plaintiffs John and Jennie Markiewicz in issue in that personal injuries are alleged to have resulted to these plaintiffs from the collision complained of, and the

injuries are alleged to be permanent in nature. It is evident, therefore, that the present physical conditions of these plaintiffs are directly "in controversy", the defendants being without information as to the extent and permanency of the injuries alleged. The petitioner, however, has made no claim for personal injuries suffered in the collision, and the petitioner's physical and mental condition is relevant only with reference to the moment of collision. It may be said that the physical and mental condition of any driver involved in a collision is relevant in that the alertness and mental acuity of such driver at the time of the collision may well affect his ability to avoid it. However, may it be concluded that every defendant driver of a motor vehicle involved in a collision is subject to mental and physical examination under the provisions of Rule 35 months and years following the collision?

The personal injury plaintiffs in their amended complaint did not charge this petitioner with any physical or mental condition contributing to cause the collision involved and have not requested either physical or mental examinations of the petitioner. Aside from the allegations of Contract Carriers, Inc. and Joseph L. McCorkhill in defense of the property damage cross-claim of The Greyhound Corporation, to which this petitioner is not a party the only pleading allegation concerning the petitioner's physical or mental condition on the date of the accident is that contained in the National Lead Company property damage cross-claim to the effect that this petitioner's vision was defective (R. p. 52). Thus, the physical or mental conditions which fall within the medical specialties of internal medicine, neurology or psychiatry clearly should not have been considered "in controversy". It is par-

ticularly apparent that the mental condition of the petitioner may not be considered to be "in controversy", and it is suggested that the ordering of psychiatric examinations of the petitioner constitutes a wholly unwarranted invasion of petitioner's right of privacy inasmuch as the conduct of such examinations would necessarily subject the petitioner to the most intimate of inquiries and disclosures involving not only himself but all members of his family. No court in any reported case arising under the Federal Rules of Civil Procedure has ever granted an order requiring even an eye examination of a defendant driver in a tort action and certainly never nine examinations in the several medical specialties involved here. As stated in *Wadlow* v. *Humberd,* (1939), 27 F. Supp. 210, 212, "Obviously the Rule (35) looks to a situation in which the mental or physical condition of a party shall be immediately and directly in controversy and not merely in controversy, incidentally or collaterally." It is submitted that the physical and mental condition of the petitioner is not immediately and directly in controversy under the pleadings before the respondent below and that only the condition of the petitioner's vision is even incidentally or collaterally in controversy. As was succinctly stated by the Court of Appeals (majority opinion R. p. 80): "Mere lip service to the requirements of 'in controversy' and 'good cause' in Rule 35 falls short of a district court's duty to litigants, particularly those not voluntarily in court, to protect the individual's right of privacy". "The rule was never intended to be used by adverse parties as a means to harass opponents with troublesome mental and physical examinations in the hope that by chance some mental or physical impairment might be discovered."

C. Respondent's Order Was Issued Without a Showing of Good Cause for Either Physical Or Mental Examinations of Petitioner.

A third prerequisite under Rule 35 for the issuance of an order for the physical or mental examination of a party is that good cause therefor be shown. As stated by the Court of Appeals (majority opinion, R. p. 80):

> "While the party seeking Rule 35 discovery need not prove his case before obtaining an order for discovery, it is incumbent upon him affirmatively to demonstrate: (1) the probability that the adverse party's physical and mental condition is relevant and proximate in point of time to the underlying issues of the litigation and that such condition is in controversy; and (2) good cause to believe that a physical or mental examination would best serve to promote the ascertainment of truth and that other means of discovery or proof are less satisfactory considering the law's solicitude for a party's privacy."

The requirement that good cause be shown before a Rule 35 order may be entered is expressed mandatorily and as stated in *Guilford National Bank of Greensboro* v. *Southern Ry. Co.*, (4th Cir. 1962), 297 F. 2d 921, 924:

> "Under Rule 35, the invasion of the individual's privacy by a physical or mental examination is so serious that a strict standard of good cause, supervised by the district courts, is manifestly appropriate."

The correct application of Rule 35 is even more important than the application of other discovery rules in that an invasion of the person is involved.

See Mr. Justice Frankfurter's dissent in *Sibbach v. Wilson & Co.*, (1941) 312 U.S. 1:

> "I deem a requirement as to the invasion of the person to stand on a very different footing from questions pertaining to the discovery of documents, pre-trial procedure, and other devices for the expeditious, economical and fair conduct of litigation."

To their petition of February 5, 1963 for the physical and mental examination of the petitioner, the cross-defendants Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company attached a one-page affidavit of one of the attorneys for Contract Carriers, Inc. and Joseph L. McCorkhill averring as the basis for the several examinations requested that (1) the petitioner saw red lights for ten to fifteen seconds prior to the collision, (2) a truck driver witness who was approaching the truck with which the petitioner's bus collided saw lights of the truck for a distance of three-quarters to one-half mile to the rear of the truck immediately prior to the collision, and (3) the petitioner was involved in a similar type collision on a prior occasion. (R. p. 13-14). It should be noted in regard to the first of these sworn statements that it does not include an allegation that the petitioner saw any lights on the rear of the truck involved, but only that he saw lights. Indeed, no statement could have been included that the petitioner saw lights on the truck involved since he has consistently denied seeing any such lights. It is submitted that his seeing lights on any other vehicle ahead of him only serves to support his contention that he was keeping a proper lookout, at least for properly lighted vehicles, and such fact does not support an order for

even an eye examination and certainly not for examination within the specialties of internal medicine, neurology and psychiatry. The second of the sworn statements refers, not to anything seen or not seen by the petitioner, but only to lights observed by the driver of another vehicle, which, as shown by the pleadings, was proceeding during part of the time involved ahead of the bus and thus in a position to obstruct the view of the petitioner bus driver. It is submitted that the view of the said eye-witness from another vehicle in another position on the highway cannot be said to constitute good cause for examination of the petitioner in any of the four specialties designated.

The final statement relied upon as showing good cause recites that the petitioner was "involved" in a similar type collision while operating a motor bus on another occasion. The statement made does not include information as to whether the bus was the striking vehicle or the vehicle struck at the time of the prior collision, and it is submitted that the vague reference to such prior collision included in the said affidavit is wholly insufficient to support the showing of good cause which is expressly required by Rule 35. It may be noted that nowhere in the petition for physical and mental examinations of the petitioner or in the affidavit filed in support thereof is it stated that such examination *at this time* could possibly reveal either the physical or mental condition of the petitioner as it existed on July 13, 1962. Although the co-defendants who sought the examinations conclude that they have no other means than by such examinations to determine the condition of the petitioner, would not the prior condition of the petitioner as revealed by the public records of the Interstate Commerce Commission with

respect to required physical examination be more relevant in showing his condition at the time of his collision than the results of even nine physical and mental examinations performed many months after the collision? The respondent entered the order of February 15, 1963, without a hearing and without inquiring beyond the petition itself. As has been previously argued, at the time the original order was entered on February 15, 1963, the petitioner was not a party.

In the important matter of showing good cause for the multiple examinations of this petitioner, National Lead Company concluded in its petition of March 14, 1963, upon which the respondent's order of March 15, 1963 was entered, only that it could not "properly present" its defense without the four physical and mental examinations asked for (R. p. 66), and good cause is not mentioned in either the National Lead Company's petition or the respondent's order. Neither was the petition of National Lead Company, filed March 14, 1963, supported by affidavit. The respondent entered the orders on March 15, 1963 without a hearing or without inquiry beyond the petitions themselves. As stated by Circuit Judge Kiley in his dissenting opinion (R. p. 83):

> "It seems to me the constitutional right of personal privacy should not be transgressed in search for truth under Rule 35 in civil cases until the trial court has by inquiry established a sufficient basis upon which to exercise discretion as to whether an order for physical and mental examinations is the only adequate method of reaching the truth about a matter in controversy and whether the truth sought is relevant. That was not done here."

An invasion of an individual's privacy by a physical or mental examination is so serious that a strict standard of good cause must be applied. The petitioner submits that the respondent abused his discretion under the provisions of Rule 35 in ordering the physical and mental examinations of the defendant petitioner where there was no adequate basis established for said order.

D. Respondent's Order Requires Nine Physical and Mental Examinations Even Though Only Four Such Examinations Were Requested.

The motion of the cross-defendants Contract Carriers, Inc., Joseph L. McCorkhill, and National Lead Company, which led to the respondent's order of February 21, 1963, specifically asked only that Robert L. Schlagenhauf be examiner by one of two nominated internists, one of two nominated ophthalmologists, one of three nominated neurologists, and one of two nominated psychiatrists (R. p. 9). However, the respondent entered the order not only sustaining the cross-defendants' motion, but greatly exceeding its prayer in that nine examinations were ordered instead of the already excessive number of four examinations requested. (R. p. 5, 6). The motion of the cross-defendant National Lead Company which led to the respondent's order of March 15, 1963 specifically asked only that Robert L. Schlagenhauf be examiner by one qualified specialist in the fields of internal medicine, ophthalmology, neurology and psychiatry. (R. p. 66). However, the respondent entered the order dated March 15, 1963 not only sustaining the cross-defendant's motion, but greatly exceeding its prayer in that nine examinations were ordered instead of the already excessive number

of four examinations requested. (R. p. 68. 69). It may only be concluded that the additional five examinations were ordered independently of the motion and contrary to the provisions of Rule 35 (a), which provides that "the order may be made only on motion for good cause shown . . .". Apart from Rule 35, the respondent could only have entered on order for physical and mental examinations if a statute of the State of Indiana authorized such an order (See *Camden & Suburban Ry. Co.* v. *Stetson* (1900), 177 U.S. 172, 20 S. Ct. 614, 44 L. ed. 721). There is no such Indiana statute and, although the Indiana Supreme Court has recognized a right to compel a physical examination despite the absence of statutory authority, the right is limited to defendants in compelling the physical examinations of plaintiffs in personal injury actions. (City of South Bend v. Turner (1900, 156 Ind. 418, 60 N.E. 271)). The respondent's order, therefore was wholly unauthorized and constituted a usurption of judicial power as to the ordering of the five additional examinations. The petitioner respectfully submits that the respondent therein committed gross error amounting to an abuse of discretion.

IV

RESPONDENT'S ORDER IS NOT IN CONFORMITY WITH RULE 35 AND THEREFORE VIOLATES PETITIONER'S CONSTITUTIONAL RIGHTS

The important nature of these issues was expressly recognized by the Court of Appeals, as aforesaid, and it is evident that appeal is a wholly inadequate relief in that the invasion of the petitioner's person and deprivation of his liberty would necessarily have become an accomplished fact at the time of final judgment in the property damage cross-claim below unless

petitioner would elect to refuse examination, thus becoming subject to the drastic penalties authorized by Rule 37 (b) (2) of the Federal Rules of Civil Procedure. It is submitted that the enforced delivering up of one's person to restrain or interference by others is far more than a technical or unimportant invasion of personal privacy and that it is indeed irreparable in that it cannot be righted or retracted. If it may be said that the respondent acted in conformity with Rule 35 of the Federal Rules of Civil Procedure, which has the force of law, then petitioner would not be in a position to complain that his constitutional rights have been violated. As stated in *Lewis* v. *Johnston* (7th Cir. 1940), 112 F. 2d 447, in which it was claimed that the plaintiff's substantive right of privacy in his rights under the 4th, 5th and 14th Amendments to the United States Constitution were violated, the court properly said:

> "We are of the opinion that the order of a district court made in conformity to the rule in question did not violate any constitutional rights of the plaintiff."

However, in the foregoing argument petitioner has set forth those grounds upon which he honestly contends that the order entered against him was not within the power of a district court to issue, or assuming the district court had authority, said order was not in conformity with Rule 35 and exceeded the authority granted in that rule. If, in fact, the orders of the respondent are not authorized by clear and unquestionable authority of law, pursuant to Rule 35, there being no inherent power in federal court to order such examinations of a person (*Union Pacific Ry.* v. *Botsford* (1891), 141 U.S. 250), it is respectfully urged that

said orders constitute an invasion of the petitioner's person and a deprivation of his liberty and thereby violates his right of privacy and the following guarantees of the Constitution of the United States:

4th Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5th Amendment, United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

14th Amendment, United States Constitution:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, nor any place subject to their jurisdiction."

V

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

ROBERT S. SMITH
13 North Pennsylvania Street
Indianapolis, Indiana

WILBERT MCINERNEY
One Thousand Connecticut Avenue
Washington, D. C.

DAVID A. STECKBECH
13 North Pennsylvania Street
Indianapolis, Indiana

CHARLES T. BATE
13 North Pennsylvania Street
Indianapolis, Indiana

Counsel for Petitioner